Case No. SC85889

IN THE
MISSOURI SUPREME COURT

AMERISTAR JET CHARTER, INC. and
SIERRA AMERICAN CORPORATION
Cross-Appellants,

v.

DODSON INTERNATIONAL PARTS, INC. and
HOUSTON CASUALTY COMPANY
Cross-Appellees.

Appeal from the Circuit Court of
Jackson County, Missouri at Kansas City

APPELLANTS AMERISTAR JET CHARTER, INC.'S AND SIERRA AMERICAN CORPORATION'S SUBSTITUTE BRIEF IN RESPONSE TO THE SUBSTITUTE BRIEF OF RESPONDENT HOUSTON CASUALTY COMPANY

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STATEMENT OF JURISDICTION

These consolidated appeals arise out of two judgments from the same underlying lawsuit: (1) Ameristar Jet Charter, Inc. and Sierra American Corporation (collectively, "Ameristar") appeal of the order entered by the Honorable John R. O'Malley, Circuit Judge of the Circuit Court of Jackson County, Missouri, on September 14, 2000 granting summary judgment against Ameristar and in favor of Houston Casualty Company based on a release; and (2) Ameristar's cross-appeal (in response to the appeal of Dodson International Parts, Inc. ("Dodson")) of the post-trial judgment for Ameristar against Dodson entered by the Circuit Court of Jackson County, the Honorable Lee E. Wells, on June 14, 2002, which disposed of all remaining claims. The summary judgment and the post-trial judgment are thus final and appealable judgments pursuant to Missouri Rules of Civil Procedure 74.01 and 81.05. Following an opinion by the Missouri Court of Appeals, Western District, issued January 20, 2004, this Court ordered the case transferred pursuant to Rule 83.04 on April 27, 2004.

STATEMENT OF FACTS

This appeal arises out of an insurance dispute after the insurer, over the insured's objection, declared an under-insured airplane a total loss. In April 1998, Sierra American Corporation and Ameristar Jet Charter, Inc. (collectively "Ameristar"), owned and operated a Dassault Falcon 20 jet aircraft having Serial No. 16 and Registration (or "tail") number N216TW (the "Aircraft"). (R. 403) Ameristar is in the on-demand air charter business, deriving the majority of its business from carrying auto parts for the "big three" auto manufacturers. (R. 403) Ameristar used the aircraft to deliver parts to the manufacturers. On April 9, 1998, the Aircraft made an emergency ("off-airport") landing in Jackson County, Missouri. (R. 403) At the time, the Aircraft was insured by Houston Casualty Company ("HCC") in the amount of $1,500,000.00, but it had a value of approximately $1,800,000.00. (R. 62) In accordance with its policy with HCC, Ameristar notified Larry Galizi ("Galizi") of the emergency landing. (R. 393) Galizi was the person who sold the insurance to Ameristar. (R. 393)

HCC, through Howe Associates, Inc. ("Howe"), hired Dodson to transport the Aircraft to the Kansas City, Missouri downtown airport. (R. 90) Transporting the aircraft required Dodson to remove the wings from the aircraft and haul them separately from the fuselage of the Aircraft. (R. 116-121) Dodson transported the fuselage by placing it on a flat-bed trailer, supported by tires and railroad ties. (R. 116-121)

After it inspected the Aircraft, Howe informed Ameristar and HCC that the fuselage was permanently bent, the Aircraft had severe structural damage, and that the cost to repair the Aircraft was prohibitively high. (R. 363, 377) This assessment was

made without ever taking the Aircraft off of the trailer, tires and cross-ties on which Dodson had moved it. (R. 365-366)

HCC declared the Aircraft a total loss, obligating itself to pay Ameristar the $1,500,000.00 policy proceeds. (R. 355) Ameristar repeatedly requested that the Aircraft be removed from the trailer for inspection. (R. 363, 375) Despite Ameristar's requests, HCC refused to remove the Aircraft from the trailer to determine the actual extent of the damage. (R. 363) HCC told Ameristar that HCC had the "right" to declare the Aircraft a total loss even if Ameristar objected. (R. 398, 400-401)

Despite its contractual obligation to pay Ameristar the policy proceeds, HCC required Ameristar to execute a Proof of Loss ("POL") before it would agree to make payment, which Ameristar did. (R. 60, 63, 98, 100, 162-163) The POL contained an alleged "release" of claims "under the policy" for "said loss." Specifically, the release stated:

> In consideration of such payment said Company is hereby discharged and forever released from any and all further claim, demand or liability whatsoever for ***said loss*** and damage***, under the Policy herein referred to***, repairs and/or replacements having been made to my entire satisfaction.

(R. 234) (emphasis added) After signing the POL, Ameristar received payment from HCC of the $1,500,000.00 policy proceeds. (R. 60, 100) Ameristar was unable to

replace the Aircraft for almost nine (9) months due to the need to find a comparable aircraft and have a cargo door installed. (R. 403-404)

After the Aircraft was declared a total loss by HCC, Dodson purchased the Aircraft from HCC for $750,000. (R. 93) Dodson was then able to repair the aircraft for approximately $100,000.00. (R. 93) The fuselage was not permanently bent. (R. 138-139) It "popped" back into place once it was removed from the trailer. (R. 138-139)

Ameristar brought this lawsuit against Dodson, Howe, and HCC asserting claims of negligence, negligent misrepresentation, and bad faith, seeking to recover its uninsured loss (the underinsured value of the Aircraft) and its lost profits--an amount found at trial to be $2.1 million. (R. 268-277; 688) Prior to trial, HCC moved the trial court for summary judgment based on the release language contained in the POL. (R. 174-180; 181-267) On September 26, 2000, the trial court granted HCC's motion for summary judgment finding "that [Ameristar's] claims arise out of the relationship between the Plaintiff and Houston Casualty Company. Concluding, therefore, that the claim of [Ameristar] is 'mentioned' [in the release]." (R. 564) Ameristar settled its claim against Howe for $50,000.00 prior to trial. (R. 874; 915) In April 2002, Ameristar's claim against Dodson for negligence was tried to a jury. (R. 579-585; 689-692) The jury returned a verdict finding Dodson seventy percent (70%) responsible and Ameristar thirty percent (30%) responsible. (R. 688) The jury found Ameristar's damages to be $2.1 million. (R. 688) An appeal to the Court of Appeals for the Western District of Missouri followed.

On January 20, 2004, after reviewing the briefs of the parties and hearing oral argument, the Court of Appeals entered its opinion reversing the trial court's grant of summary judgment in favor or Houston Casualty. Specifically, the Court of Appeals held that because the release signed by Ameristar refers only to claims for loss under the Policy, Ameristar did not release its tort claims against Houston Casualty. This appeal to the Supreme Court followed.

POINTS RELIED ON

Point One: The Court of Appeals properly reversed the trial court's order granting Houston Casualty Corporation's ("HCC's") Motion for Summary Judgment based on a release contained in the Proof of Loss ("POL") because there were genuine issues of material fact making summary judgment in HCC's favor improper:

A. There was a genuine issue of material fact as to whether the POL released Ameristar's extra-contractual claims (i.e., claims for negligence, negligent misrepresentation and bad faith) in that the POL does not apply to Ameristar's tort-based claims against HCC under the governing law;

- *Lyons v. Millers Casualty Insurance Co.*, 866 S.W.2d 597 (Tex.1993);
- *Memorial Medical Center of East Texas v. Keszler*, 943 S.W.2d 433 (Tex.1977); and
- *Vaughn v. Hartford Casualty Insurance Co.*, 277 F. Supp. 2d 682 (N.D. Tex. 2003).

B. There was a genuine issue of material fact as to whether the POL released Ameristar's claims for uninsured losses in that the summary judgment record demonstrates that the release drafted by HCC only applied to "said loss" and claims "under the Policy" and did not unambiguously prohibit claims for uninsured losses;

C. There was a genuine issue of material fact as to whether the release was induced by HCC's misrepresentations and may be avoided, in that:

1. HCC misrepresented the condition of the Aircraft before Ameristar signed the release, and

2. HCC misrepresented that it had the right to declare the Aircraft a total loss against Ameristar's wishes; and

- *Lee v. Lee*, 44 S.W.3d 151 (Tex. App.--Houston [1st Dist.] 2001, writ denied);
- *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997).

D. There was a genuine issue of material fact as to whether the release was supported by consideration, in that HCC was contractually obligated to pay Ameristar the $1.5 million insured value of the Aircraft after declaring the Aircraft a total constructive loss, whether or not Ameristar provided a release;

- *Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997);
- *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893 (Tex.App.--Corpus Christi 1989).

ARGUMENT AND AUTHORITIES

I. THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT'S ORDER GRANTING HOUSTON CASUALTY CORPORATION'S ("HCC'S") MOTION FOR SUMMARY JUDGMENT BASED ON A RELEASE CONTAINED IN THE PROOF OF LOSS ("POL") BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT MAKING SUMMARY JUDGMENT IN HCC'S FAVOR IMPROPER.

A. STANDARD OF REVIEW.

An appellate court reviews the trial court's grant of summary judgment *de novo*. *McDermott v. Missouri Bd. of Probation and Parole*, 61 S.W.3d 246, 247 (Mo. 2001, *en banc*). "The criteria on appeal for testing the propriety of summary judgment are no different from those that should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id*. In reviewing a summary judgment, the record is reviewed in the light most favorable to the party against whom summary judgment was granted and the non-movant is accorded the benefit of all reasonable inferences from the record. *Letsinger v. Drury College*, 68 S.W.3d 408, 410 (Mo. 2002, *en banc*). The appellate court "does not defer to the trial court's judgment granting summary judgment . . ." *Id*.; *McDermott* , 61 S.W.3d at 247.

In the court below, HCC and Ameristar agreed that Texas law governed the dispute between them. However, the trial court erred in its application of Texas law. The

Court of Appeals properly applied Texas law and concluded that the release did not bar Ameristar's tort claims.

The trial court granted HCC's Motion for Summary Judgment based on release language contained in the POL that Ameristar was required to sign. Ameristar raised several fact issues with regard to the validity, application and extent of the alleged release. Because Ameristar raised material fact issues, the trial court's grant of summary judgment was error and the Court of Appeals properly reversed the summary judgment for HCC.

B. THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE POL RELEASED AMERISTAR'S EXTRA-CONTRACTUAL CLAIMS (*I.E.*, CLAIMS FOR NEGLIGENCE, NEGLIGENT MISREPRESENTATION AND BAD FAITH) BECAUSE THE POL DOES NOT APPLY TO AMERISTAR'S TORT-BASED CLAIMS AGAINST HCC UNDER THE GOVERNING LAW.

1. The POL does not bar extra-contractual claims.

The Court of Appeals properly determined that, under Texas law, the POL was not so broad as to include Ameristar's tort claims. (Ct. App. Opinion, pp. 11-12) The POL is limited in scope; it only includes a release of claims *under the Policy* (that is, contract claims) for the insured loss. The POL does not include a release of the claims brought by Ameristar in this case--*tort claims*. The release states:

> In consideration of such payment said Company is hereby discharged and forever released from any and all further claim, demand or liability whatsoever for ***said loss*** and

> damage**, *under the Policy herein referred to,*** repairs and/or replacements having been made to my entire satisfaction.

(R. 234) In this action, Ameristar did not make a claim against HCC "under the policy." Instead, Ameristar sued HCC based on claims of negligence, negligent misrepresentation and bad faith. The plain language of the release is not applicable to, and does not affect, Ameristar's tort claims.

Texas law clearly holds that the POL only releases contractual claims under the insurance policy, and not claims based in tort or bad faith. Even HCC concedes that "Texas legal principles recognize that an insurer's liability under an insurance contract is *separate and distinct* from its liability for the tort of bad faith." *Lyons v. Millers Casualty Ins. Co.* , 866 S.W.2d 597, 600 (Tex.1993); (HCC's Substitute Brief, p. 43).

Texas law requires a release to "mention" a specific claim to be effective. *Memorial Med. Center of East Texas v. Keszler*, 943 S.W.2d 433, 434-35 (Tex.1977). The HCC POL does not mention tort claims. The trial court's order considered Ameristar's claims "mentioned" simply by virtue of the fact that they arise out of HCC's and Ameristar's relationship. (R. 564) As the Court of Appeals recognized, this is a misapplication of the holding in *Keszler*. The POL in the instant case does not "mention" tort claims, it is specifically limited to claims "***under the Policy***." Further, the release at issue in *Keszler* was much broader than the one at issue here; it specifically referred to:

> ...all causes of action of any kind whatsoever . . . ***relating to the [doctor's] relationship with [hospital]*** . . . it being the

> intent of [doctor] to release all claims of any kind or character which he might have against [hospital]."

Memorial Medical Center, 943 S.W.2d at 434-35 (emphasis added). To the contrary, the release here is limited to specific claims---those "under the Policy" for "said loss"; that is those under the contract for the $1.5 million. The trial court's misapplication of *Keszler* was error, and summary judgment in HCC's favor was improper. Thus the Court of Appeals properly reversed the Order.

In a more recent Texas federal case, as discussed by the Court of Appeals, a release much broader in scope than the POL at issue in this case was found not to bar claims arising out of the insurance company's handling of a claim. *Vaughan v. Hartford Casualty Ins. Co.*, 277 F. Supp. 2d 682 (N.D. Tex. 2003). Specifically, the release in *Vaughn* stated:

> I, Ritchie Vaughn, in consideration of the sum of Two Hundred Thousand Dollars and No/100 ($200,000.00) to be paid by the Hartford have **RELEASED, ACQUITTED** and **FOREVER DISCHARGED** [Vaughn's employer] *and Hartford Casualy Insurance Company* . . . from any and all claims, demands, and causes of action, of whatsoever nature, whether in contract or tort, for bodily injury and property damage which have accrued or may ever accrue to me, Ritchie A. Vaughn . . . for an on account of the incident/auto accident which occurred on or about July 8, 2000 . . . .

Id. at 687.

Interpreting this release, the Court in *Vaughn* found that it was not sufficiently broad to bar the plaintiff's claims against the insurance company for its improper handling of the claim. In contrast, the Court in *Keszler* held both tort and contractual claims barred where the release covered all claims arising out of the parties relationship. A review of the release language in *Vaugn* and *Keszler*, clearly establishes that the POL was more like the release in *Vaughn* than the one in *Keszler*. In *Vaughn*, the release contained language limiting the scope of the release to claims for bodily injury and property damage arising out of the incident/auto accident. *Id*. at 687. The release did not mention torts for improper claims handling. In the instant case, the POL contained similar language restricting its scope. Specifically, the release is limited to claims for "said loss and damage, under the Policy." (R. 234) As recognized by the Court of Appeals, this language refers to the loss of the airplane, not the handling of the claim. (Ct. App. Opinion, p. 7) Unlike the releases in *Vaughn* and the instant case, the release in *Keszler* contained no such limiting language. Indeed, the release in *Keszler* expressly included any claims arising out of the parties relationship. The scope of the *Keszler* release was substantially broader than the releases in *Vaughn* and this case.

Finding that the POL in this case was closer to the release in *Vaugn*, the Court of Appeals correctly held that the release of "said loss . . . under the Policy" only served to release contractual claims under the Policy, not the tort claims asserted by Ameristar.

Houston Casualty argues that the Court of Appeals' reliance on *Vaughn* was misplaced because the Court in *Vaughn* also found that the release was broad enough to bar plaintiff's statutory claim for failure to promptly pay a claim. However, Houston Casualty fails to appreciate that this finding in *Vaughn* rests on the fact that the duty to pay is deemed in law to be a part of the contractual obligation. *Vaughn*, 277 F. Supp. 2d at 689. Claims arising out of the handling of an insurance claim are not contractual in nature. *See Vaughn*, 277 F. Supp. 2d at 689; *Eastham v. Nationwide Mutual Ins. Co.*, 586 N.E.2d 1131, 1135 (Ohio Ct. App. 1990). Therefore, the Court of Appeals correctly held that the POL only barred contractual claims arising under the Policy and that Ameristar's tort claims based on HCC's handling of the claim were not barred.

2. The POL does not bar Ameristar's claim for bad faith or negligence.

In its Substitute Brief, HCC contends that because it paid the policy limits there can be no bad faith claim. (HCC Substitute Brief, pp. 40-42) HCC fails to appreciate that the focus is not on the act of payment, but on the investigation of the claim.

HCC admits in its Substitute Brief that an insurer breaches its duty of good faith and fair dealing when it *fails to reasonably investigate* a claim in order to determine whether its liability is reasonably clear. (HCC Substitute Brief, p. 42) *See Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56, n. 5. It is precisely the failure to reasonably investigate this claim that Ameristar asserts is bad faith. In short, if HCC had reasonably investigated the damage they would have discovered the relatively small amount of money that would be required for repairs. Instead, HCC refused to investigate, totaled

the aircraft—against Ameristar's wishes—and caused Ameristar to suffer not only the uninsured loss but also the loss of use of the aircraft for several months. Ameristar wanted the aircraft repaired, not totaled. However, rather than rather than spend the money for repairs, or even adequately investigate to determine the repairs required and their cost, chose instead to limit its exposure by totaling the aircraft and then selling the aircraft to Dodson for $750,000.

It is exactly the speed of HCC's payment, the failure to reasonably investigate the damage to the aircraft, and the coerced acceptance of the policy proceeds that Ameristar contends constitute HCC's bad faith. The doctrine of bad faith arises out of the disparity of bargaining power between the insurer and insured. *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210, 212 (Tex. 1988). It was the disparity in bargaining power that led to HCC misrepresenting the condition of the Aircraft, refusing to repair the Aircraft and then misrepresenting to the Plaintiffs that HCC had the "right" to declare the Aircraft a total constructive loss.

As an example, assume a $30,000 car with an insurance policy limit of $25,000 is in an accident. If, instead of investigating the extent of the damage, the insurance company simply declares the car totaled and pays the owner the policy limits, $25,000, the owner is harmed. The car cannot be replaced for $25,000. In addition, the owner is deprived of the use of the car until a replacement can be found. Now assume that, with an investigation, the car could have been repaired for $1,650. With a reasonable investigation the owner would not lose the use of the car or face paying more for a replacement vehicle. This is exactly what happened in the instant case.

Upon being notified of the accident, HCC refused to remove the aircraft and conduct testing to determine the extent of the damage. Instead, HCC decided that the plane was bent and declared it a total loss and paid the full policy proceeds. However, if HCC had conducted an investigation they would have determined that the aircraft could have been repaired for approximately $100,000, a fraction of the policy proceeds. Further, with an investigation, Ameristar would not have lost the use of the aircraft while a replacement was sought or faced paying more for the replacement. The fact that HCC paid the policy proceeds does not detract from their failure to reasonably investigate when it was the failure to investigate that caused the harm to Ameristar.

HCC admits that the failure to reasonably investigate can constitute a breach of the duty of good faith and fair dealing. (HCC Substitute Brief, p. 42) At the very least there is a fact issue on whether HCC acted reasonably in refusing to remove the aircraft from the trailer for testing. Though this issue was not addressed by the Court of Appeals, clearly HCC was not entitled to summary judgment on this basis.

The foregoing argument is equally applicable to Ameristar's negligence claims. HCC erroneously asserts that Ameristar's negligence claim is simply a request that Ameristar did not receive what it was entitled to under the Policy. HCC misstates Ameristar's position. Ameristar's negligence claim, like its bad faith claim, centers on HCC's failure to investigate. If HCC had reasonably investigated the extent of the damage then it would likely have determined that the aircraft was not a total loss. Indeed, if HCC had conducted a reasonable investigation, Ameristar would not have suffered the loss of the uninsured value of the aircraft or the loss of use of the aircraft for the many

months while a replacement was sought. The reasonableness of the investigation is a question of fact for the jury. Like the argument on bad faith, this issue was not briefed or addressed in the Court of Appeals. Nevertheless, Ameristar's negligence claim, like bad faith, arises from the handling of the claim, not the accident itself. Thus, the Court of Appeals correctly held that the claim was not barred by the POL.

C. THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE POL RELEASED AMERISTAR'S CLAIMS FOR UNINSURED LOSSES IN THAT THE SUMMARY JUDGMENT RECORD DEMONSTRATES THAT THE RELEASE DRAFTED BY HCC ONLY APPLIED TO "SAID LOSS" AND CLAIMS "UNDER THE POLICY" AND DID NOT UNAMBIGUOUSLY PROHIBIT CLAIMS FOR UNINSURED LOSSES.

The trial court also erred in granting summary judgment because there was a genuine issue of material fact as to the breadth of the release. Ameristar did not seek to recover any portion of the insured loss--the $1.5 million already paid by HCC. Instead, Ameristar sought to recover the *uninsured* losses caused by the Defendants' conduct. Specifically, Ameristar sought to recover the underinsured value of the Aircraft and Ameristar's lost profits from the loss of the use of the Aircraft when the aircraft was "totaled" over Ameristar's objection.

The "release" on which the Court granted summary judgment is limited to claims for "said loss" (the loss for which payment was already made) "under the policy." (R. 234) The release simply does not apply to Ameristar's claim for uninsured losses. Larry Galizi, HCC's agent, confirmed to Ameristar (before it cashed the HCC check) that the

POL did not prohibit claims against *anyone* for uninsured losses. (R. 399) Therefore, there is a genuine issue of material fact issue about the breadth and scope of the release, which made summary judgment for HCC improper.

At the very least, Ameristar raised an issue of fact with regard to the meaning of the phrases "said loss" and "under the policy." Any ambiguity in the release language in the POL must be resolved against HCC, the one who drafted the document, and in favor of Ameristar. *State Farm Fire & Cas. Co. v. Reed,* 873 S.W.2d 698, 699 (Tex. 1993). The trial court failed to do so. Therefore, the trial court erred in granting HCC"s motion for summary judgment.

D. THERE WAS A GENUINE ISSUE OF MATERIAL FACT WHETHER THE RELEASE WAS INDUCED BY HCC'S MISREPRESENTATIONS AND MAY BE AVOIDED.

The trial court erred in granting summary judgment when Ameristar raised fact issues as to the validity of the release by presenting evidence that the release was induced by misrepresentations of HCC.

1. HCC misrepresented the condition of the Aircraft before Ameristar signed the release.

After the off-airport landing, HCC communicated with Ameristar, its insured, through its adjuster, Howe. There was evidence that: (1) Howe was hired by HCC to assess the cost to repair the Aircraft; and (2) Howe was HCC's agent for purposes of communicating with Ameristar. (R. 354, 357, 360) The representations by Howe about the condition of the Aircraft are imputed to HCC since Howe was acting as HCC's agent.

See generally Wal-Mart Stores, Inc. v. Itz, 21 S.W.3d 456, 477 (Tex. App.--Austin 2000, writ denied).

Ameristar presented evidence that, through Howe, HCC represented to Ameristar that the Aircraft was permanently bent, had severe structural damage and that the cost to repair the Aircraft was prohibitively high. (R. 377, 365-366) The representations were false. Had HCC removed the Aircraft from the trailer as Ameristar requested, it would have known that the fuselage was not permanently bent, as evidenced by Dodson's subsequent purchase and repair of the aircraft for only $100,000.00. HCC's statements about the condition of the fuselage and the cost to repair the Aircraft were false at the time they were made.

A release is a contract. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 178 (Tex. 1997). A contract induced by misrepresentations may be avoided. *Id*. at 178-179. HCC's misrepresentations about the condition of the aircraft coupled with the representations by Larry Galizi, HCC's agent, that the POL did not prohibit claims against anyone for uninsured losses raised a fact issue about the validity of the release. Summary judgment for HCC was, therefore, improper.

2. HCC misrepresented that it had the right to declare the Aircraft a total loss against Ameristar's wishes.

Further, Ameristar introduced evidence that the release was not entered into voluntarily. HCC argued that the Plaintiffs "freely and voluntarily entered into the release." (R. 192) Ameristar introduced evidence that it was induced to sign the POL through statements that HCC had the "right" to declare the Aircraft a total constructive

loss, even if Ameristar objected. (R. 398, 400-401) HCC did not have that right. (R. 356) In addition, Ameristar introduced evidence that had it known that HCC did not have the right to total the Aircraft, it would have insisted that the Aircraft be repaired. (R. 393-394) The evidence indicated that Ameristar was coerced into signing the POL.

A contract entered into as a result of coercion is invalid. *Lee v. Lee*, 44 S.W.3d 151, 154 (Tex. App.--Houston [1st Dist.] 2001, writ denied); citing *Kosowska v. Kahn*, 929 S.W.2d 505, 508 (Tex. App.--San Antonio 1996, writ denied) (holding that duress or coercion would invalidate a contract if the coercion comes from the opposing party). Whether HCC's conduct rose to the level of coercion was a question of fact for the jury. Summary judgment was improper when Ameristar raised a fact issue with regard to whether the release was entered into voluntarily or as a result of coercion.

E. THERE WAS A GENUINE ISSUE OF MATERIAL FACT WHETHER THE RELEASE WAS SUPPORTED BY CONSIDERATION, IN THAT HCC WAS CONTRACTUALLY OBLIGATED TO PAY AMERISTAR THE $1.5 MILLION INSURED VALUE OF THE AIRCRAFT AFTER DECLARING THE AIRCRAFT A TOTAL CONSTRUCTIVE LOSS, WHETHER OR NOT AMERISTAR PROVIDED A RELEASE.

Finally, Ameristar raised a fact issue as to whether the release was supported by consideration. A release, like any contract, must be supported by consideration to be valid. *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893, 903 (Tex. App.--Corpus Christi 1989), *rev'd in part on other grounds*, 811 S.W.2d 931 (Tex.1991). "A contract

that lacks consideration, lacks mutuality of obligation and is unenforceable." *Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401, 408 (Tex. 1997).

In the absence of terms in the policy requiring the insured to execute a receipt in full upon payment of the loss, the insurer cannot exact such a receipt. 6 Appleman, *Insurance Law and Practice*, § 4009 (1972). A release, like any other contract, may be invalidated for lack of consideration. *Victoria Bank & Trust Co.*, 779 S.W.2d at 903. The payment of a liquidated, undisputed, matured obligation does not furnish the consideration for the release of any additional obligation. In 1 CJS, Accord and Satisfaction, § 29, it is said:

> The payment of a sum admittedly due and payable furnishes no consideration for the discharge of an additional and distinct amount or item of liability, and does not effect an accord and satisfaction thereof.

The Arkansas Supreme Court phrased the doctrine as follows:

> If no benefit is received by the obligee except what he was entitled to under the original contract, and the other party to contract parts with nothing except what he was already bound for, there is no consideration for the additional contract concerning the subject matter of the original one.

DeSoto Life Ins. Co. v. Jeffett, 196 S.W.2d 243, 246 (Ark. 1946); citing, *Feldman v. Fox*, 164 S.W. 766, 767 (Ark. 1946).

Here, the insurer, HCC, exacted a "release" as a condition to payment of the Policy proceeds. The release is unenforceable because it is not supported by consideration. HCC did what it was contractually obligated to do when it declared the aircraft a constructive total loss--pay $1.5 million. Furthermore, there was no evidence of any requirement in the Policy that Ameristar execute a release in order to get paid. When HCC declared the Aircraft a constructive total loss, it was contractually obligated to pay Ameristar $1.5 million and it had no right to require Ameristar to execute a release. There is a genuine issue of material fact whether the release is supported by consideration, and the rendition of summary judgment in favor of HCC was improper.

CONCLUSION

For these reasons, Ameristar asks this Court to affirm the holding of the Court of Appeals reversing HCC's summary judgment and remand this case to the trial court for a trial of those claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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